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IN THE

Supreme Court of the United States

October Term 1942

LESLIE FULLARD-LEO AND
ELLEN FULLARD-LEO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To the Honorable
The Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the case numbered and entitled in its docket as "No. 9889, United States of America, Appellant, v. Leslie Fullard-Leo, et al, Appellees," on February 1, 1943 (R. 377)* which reversed the judgment of the District Court of the United States for the Territory of Hawaii entered on December 27, 1940 (R. 51).

* We are unable to give the page of the record because we have not received a copy of the record from the Court of Appeals.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the title to the Island of Palmyra which is situated in the Pacific Ocean about 900 miles south of Honolulu, Hawaii. Title and possession of this island have been undisputed for 78 years, and unchallenged until this suit was brought in December 1939. The facts surrounding the title are rooted in the history of Hawaii. The action of the Circuit Court of Appeals has overturned a title recognized since 1862 by the Hawaiian monarchy and its successor governments, including the Territory of Hawaii—a title registered under the Torrens Title system by the Land Court of the Territory in 1912.

The Island of Palmyra was discovered by Captain Sawle of the American vessel Palmyra on November 6, 1802 (R. 195). It does not appear that Captain Sawle landed on the island. The United States government did not assert sovereignty over it. The island was annexed by the government of Hawaii in 1862 and made part of the Kingdom of Hawaii.

In the late 50's of the last century, Zenas Bent and Johnson Wilkinson, both Hawaiian subjects, occupied the island and made some improvements there (R. 199).

Prior to February 26, 1862, Bent and Wilkinson petitioned the Hawaiian government that the Island of Palmyra be considered a Hawaiian possession and placed under the Hawaiian flag. At a meeting of the cabinet council held on that date the King directed his minister of the interior to grant what the petitioners applied for (R. 63, 64).

On March 1, 1862, a commission was issued to Bent authorizing him to take possession of the island, and gave directions as to how to proceed (R. 71).

The purpose of the proposed annexation of the island was stated to be increasing the trade and commerce of the kingdom as well as offering protection to the interests of its subjects (R. 69). Bent later reported that he had executed his instructions and had left his workmen on the island (R. 74).

On June 18, 1862, an official proclamation was made by the minister of the interior, reciting that on April 15, 1862, Palmyra Island was taken possession of by Captain Zenas Bent in the name of Kamehameha IV, King of the Hawaiian Islands, and giving notice that henceforth said island should be considered and respected as part of the domain of the King of the Hawaiian Islands (R. 83).

Thereafter, Bent conveyed his interest to Wilkinson (R. 122), Wilkinson devised the island to his wife (R. 127), and by mesne conveyances the title became vested in Henry E. Cooper who, in 1912, registered it in the Land Court of Hawaii and received a certificate of fee simple ownership (R. 4, 148). Cooper conveyed the island (except two islets) to these petitioners in 1922 (R. 5, 251).

Neither the government of Hawaii during the monarchy (1862-1893), the provisional government (1893-1894), nor the Republic of Hawaii (1894-1898) at any time asserted possession or ownership of the island (R. 180), but in at least three years (1885-1887) the government of the monarchy assessed it for taxation as private property (R. 212-215). Nor was there any evidence that Bent and Wilkinson or any of their successors in title ever

paid any rent or royalty for the use of the island or otherwise attorned to the government (R. 209-211).

In 1912, the Governor of Hawaii reported to the Secretary of the Interior that "the private title to this island has been from a date several years before 1862 to the present time in citizens of Hawaii and one Hawaiian corporation," and that "the title to the island both as to sovereignty and as to private ownership would seem to be American without question" (R. 195).

That letter of Governor Frear was accepted as authoritative by the federal government, and the sovereignty of Hawaii by reason of the annexation of the island in 1862, and the sovereignty of the United States since 1898, based on the representations made in the letter, have been affirmed by the department of state.

> *Hackworth's* Digest of International Law (an official publication), Vol. 1, pp. 487-491.

Immediately before the commencement of this action to quiet the title to the island, the United States government had been negotiating with the Fullard-Leos for a lease of the island (R. 221-236, 278-281).

The basic facts were undisputed. The controversy is as to the application of the law to those facts.

The trial court held that the United States had failed to prove its alleged claim of title (R. 50), and entered judgment accordingly. That judgment has been reversed by the Court of Appeals.

OPINIONS BELOW

Opinion of the trial court (unreported), dated December 23, 1940, entitled "Findings of Fact and Conclusions of Law," (R. 28-50).

Opinion of the Circuit Court of Appeals, dated February 1, 1943 (R348).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1943, and the mandate has been stayed pending the filing and disposition by this Court of this petition (R378).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 347).

QUESTION PRESENTED

Did the plaintiff prove its alleged claim of title that Palmyra Island was annexed and became a part of the public or crown lands of the Kingdom of Hawaii on June 18, 1862, and that by virtue of the joint resolution of Congress, approved July 7, 1898, the absolute fee and ownership thereof vested in the United States of America?

REASONS FOR ALLOWANCE OF WRIT

This cause, we believe, is *sui generis*. Apparently, it is without judicial precedent, and presents a question which, we are convinced, ought to receive the consideration of this Court.

The initial and novel query is whether, when national sovereignty is extended to an island theretofore belonging to no nation, but which is peaceably occupied by subjects

of the annexing nation, does the island become public property, or has the sovereignty been extended to it subject to and in recognition of the prior occupants' right of possession?

In the majority opinion below (R. 359), authority was cited to the effect that where uninhabited territory is acquired by *discovery* by persons acting under governmental authority the land becomes public property of the discoverer's nation, and applied, or misapplied, it to a case where the title did not rest upon discovery but where an island, which was in the possession of persons acting solely in their own right and initiative, was subsequently annexed by the nation whose subjects they were.

Again, if none of the successive governments of the Hawaiian Islands ever asserted claim to Palmyra as public land but evidently regarded it as private property from 1862, when the island was annexed, to 1898, when the Hawaiian group was ceded to the United States, is it right or proper for the courts of the United States to now hold that during all those years Palmyra was public land, title to which passed to the United States under the terms of the joint resolution of Congress, approved July 7, 1898 (30 Stat. 750)?

Again, does not the fact that the United States government, though well aware of the claim of private ownership, remained inactive for over forty years, show that it had acquiesced in and affirmed the position taken by the governments of Hawaii when that country was an independent nation?

A review of this cause by this Court would result in an authoritative determination of unprecedented questions

and do justice where it is obvious, we believe, that sound principles have been ignored and injustice has been done.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled in its docket as "No. 9889, United States of America, Appellant, v. Leslie Fullard-Leo, et al, Appellees," and that the judgment of said court be reversed, and the judgment of the District Court of the United States for the Territory of Hawaii be affirmed, and for such further relief as to this Court may seem proper.

DATED, Honolulu, Hawaii, March 18, 1943.

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